STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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PROPOSED INTERIM ORDER

DATED: December 20, 2002

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By the Commission:

I. INTRODUCTION

On June 19, 2002, the Illinois Commerce Commission ("Commission") entered an Order on Rehearing in Docket No. 01-0485 adopting amendments to 83 Illinois Administrative Code 732, "Customer Credits" ("Part 732"). Part 732 implements Section 13-712 of the Public Utilities Act ("Act"), 220 ILCS 5/1-101 et seq., and was initially adopted by the Commission on December 19, 2001 to replace emergency rules adopted on July 25, 2001 and set to expire on December 29, 2001. Prior to the adoption of the amendments to Part 732 on June 19, 2002, the Joint Committee on Administrative Rules ("JCAR") notified the Commission of its objection to the revision of the definition of "emergency situation" in Section 732.10, the definitions section of Part 732. Among the provisions of Section 13-712 of the Act is Section 13-712(e)(6)(iii). Subsection (e)(6) establishes exemptions to when a carrier must pay prescribed credits for violating the service quality requirements of Section 13-712. Subsection (e)(6)(iii) exempts carriers from paying credits if the violation "occurs as a result of, or is extended by, an emergency situation as defined in Commission rules." The amendments adopted on June 19, 2002 include the following definition of "emergency situation:"

> "Emergency situation" means a single event that causes an interruption of service or installations affecting end users of a local exchange carrier. The emergency situation shall begin with the first end user whose service is interrupted by the single event and shall end with the restoration or installation of the service of all affected end users. The term "single event" shall include:
>
> > a declaration made by the applicable State or federal governmental agency that the area served by the local exchange carrier is either a State or federal disaster area; or
> >
> > an act of third parties, including acts of terrorism, vandalism, riot, civil unrest, or war, or acts of parties that are not agents, employees or contractors of the local exchange carrier, or the first 90 calendar days of a strike or other work stoppage; or

> a severe storm, tornado, earthquake, flood or fire, including any severe storm, tornado, earthquake, flood or fire that prevents the local exchange carrier from restoring service due to impassable roads, downed power lines, or the closing off of affected areas by public safety officials.

The term "emergency situation" shall not include:

> a single event caused by high temperature conditions alone; or
>
> a single event caused, or exacerbated in scope and duration, by acts or omissions of the local exchange carrier, its agents, employees or contractors or by the condition of facilities, equipment, or premises owned or operated by the local exchange carrier; or
>
> any service interruption that occurs during a single event listed above, but are not caused by those single events; or
>
> a single event that the local exchange carrier could have reasonably foreseen and taken precaution to prevent; provided, however, that in no event shall a local exchange carrier be required to undertake precautions that are technically infeasible or economically prohibitive.

Specifically, JCAR objected to treating "the first 90 calendar days of a strike or other work stoppage" as an emergency situation. JCAR contended that, by creating an exemption from the obligation to pay customer credits during the first 90 days of a strike or work stoppage,

> the rulemaking interferes with the collective bargaining process, since it constitutes State action granting one party to labor negotiations the benefit of a waiver of an otherwise generally applicable rule for the purpose of accommodating that party's delayed response times resulting from the other party's use of a National Labor Relations Act sanctioned economic weapon (i.e., a strike or work stoppage) (Joint Committee on Administrative Rules Statement of Objection to Proposed Rulemaking, June 11, 2002)

Although the Commission refused to withdraw or modify the proposed rules to satisfy the objection of JCAR, the Commission's Order on Rehearing in Docket No. 01-0485 ordered that a new rulemaking proceeding concerning 83 Ill. Adm. Code 732 be initiated for the limited purpose of determining whether strikes and work stoppages should be considered an emergency situation, as that term is defined in Section 732.10 of 83 Ill. Adm. Code 732, and, if so, the appropriate length of time during which

telecommunications carriers should be exempt from paying customer credits during a strike or work stoppage.

On June 19, 2002, the new rulemaking proceeding required by the Commission's Order on Rehearing in Docket No. 01-0485 was initiated by an Order in Docket No. 02-0426.

Petitions to intervene in this docket were filed by the Illinois Independent Telephone Association, Illinois Telecommunications Association, Inc. ("ITA"), Harrisonville Telephone Company ("Harrisonville"), Verizon North, Inc. and Verizon South, Inc. (collectively "Verizon"), Illinois Bell Telephone Company ("Ameritech"), the Attorney General of the State of Illinois on behalf of the People of the State of Illinois ("AG"), the Citizens Utility Board ("CUB"), and Local Union Nos. 21, 51, and 702 of the International Brotherhood of Electrical Workers ("IBEW"). All of these petitions to intervene were granted by the Administrative Law Judge. The City of Chicago ("City") entered an appearance.

Pursuant to due notice, a status hearing was held in this matter on July 18, 2002 before a duly authorized Administrative Law Judge at the Commission's offices in Springfield, Illinois. Appearances were entered by counsel on behalf of ITA, Verizon, Ameritech, AG, the City, IBEW and Commission Staff ("Staff"). The Administrative Law Judge directed the parties to address two threshold legal issues in briefs prior to taking evidence in this proceeding. Depending on the outcome of the legal questions, testimony may not be necessary. The parties submitted briefs on the following two legal questions:

(1) Does Section 13-712 of the Act preclude the Commission from promulgating a rule (Part 732) that would grant a carrier an exemption from the requirements of the rule in the event of a strike or other work stoppage?

(2) Is the Commission preempted by federal labor law from promulgating a rule (Part 732) that would grant a carrier an exemption from its obligations under that rule in the event of a strike or other work stoppage?

If either question is answered in the affirmative, the 90 day exemption contained in the current rules for work stoppages must be removed.

Initial briefs on the two legal issues were filed by ITA, Ameritech, Verizon, Harrisonville, Staff, IBEW, and jointly by the City and CUB. Reply briefs were filed by ITA, Ameritech, Verizon, Staff, IBEW, and jointly by the City, AG and CUB (collectively, Government and Consumer Intervenors or "GCI").

Status hearings were held in this matter on October 23 and 31, 2002 at the Commission's offices in Springfield, Illinois.

II. DOES SECTION 13-712 OF THE ACT PRECLUDE THE COMMISSION FROM PROMULGATING A RULE (PART 732) THAT WOULD GRANT A CARRIER AN EXEMPTION FROM THE REQUIREMENTS OF THE RULE IN THE EVENT OF A STRIKE OR OTHER WORK STOPPAGE?

A. ITA'S Position

ITA indicates that when the legislature grants an administrative agency a power or duty pursuant to statute, the agency has the power to do all that is reasonably necessary to execute that power or duty, including reasonable discretion as to the manner of executing the law. Lake County Board of Review v. Property Tax Appeal Board, 119 Ill.2d 419, 427, 519 N.E.2d 459, 463 (1988). ITA states that administrative officers may validly exercise discretion to accomplish in detail what is legislatively authorized in general terms. R.L. Polk & Co. v. Ryan, 296 Ill.App.3d 132, 140-41, 694 N.e.2d 1027, 1033 (1998)(quoting Lake County, 119 Ill.2d at 428, 519 N.E.2d at 463).

ITA notes that the Commission has been granted general rulemaking authority pursuant to Section 10-101 of the Act over all matters covered by the provisions of the Act, or by any other Acts relating to public utilities, and specific rulemaking authority with respect to new Section 13-712 of the Act as to service quality standards for basic local exchange telecommunications service and customer credits. 220 ILCS 5/13-712(c). ITA states that the Commission has been specifically authorized by clear legislative language to define by rule the term "emergency situation" as necessary to provide for a reasonable exemption to the customer credit requirements. 220 ILCS 5/13-712(6)(iii). . ITA concludes that since the Commission may validly exercise discretion to accomplish in detail what is legislatively authorized in general terms, the Commission has authority to define the term "emergency situation" by rule to provide a reasonable exemption to the customer credit requirements for strikes and work stoppages.

B. Ameritech's Position

Ameritech states that inclusion of work stoppages within the definition of "emergency situation" is fully consistent with Section 13-712(e)(6)(iii) of the Act, which provides that credits for a violations of service qualify standards do not apply if the violation "occurs as a result of, or is extended by, an emergency situation, as defined in Commission rules." Ameritech indicates that the General Assembly left it to the Commission to define "emergency situation," and that the Commission correctly found in Docket 01-0485 that work stoppages are emergency situations. Ameritech asserts that work stoppages fit within the ordinary meaning of emergency situations and that the Commission finding is not arbitrary and capricious, or an abuse of its discretion. Ameritech indicates that courts frequently describe strikes as emergency situations. Brown v. Dept. of Transportation, 735 F.2d 543, 548 (Fed. Cir. 1984); United States v. Professional Air Traffic Controllers Organization, 653 F.2d 1134, 1140 (7th Cir. 1981)

C. Verizon's Position

Verizon states that Section 13-712(e)(6)(iii) of the Act gives the Commission discretion to define "emergency situation." Verizon asserts that neither Section 13-712 nor any other provision of the Act precludes the Commission from including strikes or work stoppages within the definition of emergency situation. Verizon indicates that the Commission's conclusion in Docket 01-0485 that strikes and work stoppages fall within the definition of emergency situation was based on the Commission experience and expertise and the evidentiary record. Verizon notes that Illinois courts have stated:

> …although we are not bound by the Commission's interpretation of an evidentiary standard, due to an agency's experience and expertise, we should generally give substantial weight and deference to the interpretation of a statute by the agency charged with the administration and enforcement of the statute.

IBEW v. Illinois Commerce Comm'n, 2002 WL 137618, 772 N.E. 2d 340 (citing Illinois Power v. Illinois Commerce Comm'n, 111 Ill.2d 505, 511 (1986); Commonwealth Edison Company v. Illinois Commerce Comm'n, 322 Ill. App.3d 846, 849-50 (2001)

D. Harrisonville's Position

Harrisonville supports the position of the ITA.

E. Staff's Position

Staff contends that Section 13-712 does not preclude the Commission from promulgating a rule that would grant a carrier an exemption from that rule for work stoppages. Citing Section 13-712(e)(6)(iii) of the Act, Staff asserts that the Commission has the express authority to define "emergency situations" in a manner it deems best, based upon its experience and expertise in the field of telecommunications regulation.

In support of its position, Staff states that Illinois Courts have long held that an express statutory grant of authority to an administrative agency includes the authority to do what is reasonably necessary to accomplish the legislature's objective. Lake County Board of Revenue v. Property Tax Appeal Bd., 119 Ill. 2d 419, 427 (1998); Abbott Labs v. Illinois Commerce Comm'n, 289 Ill. App. 3d 705, 712. Staff further indicates that reasonable discretion is afforded administrative agencies so they can "accomplish in detail what is legislatively authorized in general terms." Lake Co. Bd. of Revenue, 119 Ill. 2d at 428.

F. IBEW's Position

IBEW indicates that an administrative agency has only such authority as is conferred by express provision of law or is found, by fair implication and intendment, to be incident to and included in the authority expressly conferred for the purpose of

carrying out and accomplishing the objectives of the underlying statutory provisions. Karas v. Dixon, 67 Ill.App.3d 736, 739, 385 N.E.2d 133 (1978); Fahey v. Cook County Police Merit Board, 21 Ill.App.3d 579, 583, 315 N.E.2d 573 (1974). IBEW states that an agency may not adopt regulations which exceed or alter its statutory authority Ruby Chevrolet, Inc. v. Dept. of Revenue, 6 Ill.2d 147, 126 N.E.2d 617 (1955); or which are contrary to the legislative purpose and intent of the statute People ex rel. Illinois Highway Transportation Co. v. Biggs, 402 Ill. 401, 409, 84 N.E.2d 372 at 376 (1949).

IBEW indicates that when an agency promulgates rules which are beyond the scope of its legislative grant of authority, such rules are invalid. Bio-Medical Laboratories, Inc. v. Trainor, 68 Ill.2d 540, 370 N.E.2d 223 (1977); Ruby Chevrolet, Inc. v. Dept. of Revenue, 6 Ill.2d 147, 126 N.E.2d 617 (1955). IBEW also indicates that, to the extent that any agency rule is in conflict with the statutory language pursuant to which the rule was adopted, such rule is void. Pye v. Marco, 13 Ill.App.3rd 923, 926, 301 N.E.2d 63 (1973).

IBEW asserts that the issue is not whether Section 13-712 of the Act (enacted by Public Act 92-22) granted the Commission authority to define "emergency situation" by rule, but rather whether the Commission's adoption of the "strike or other work stoppage" exemption/waiver in Part 732 is a valid exercise of that legislative grant of authority.

IBEW notes that the Commission adopted Part 732, Customer Credits in Docket 01-0485, and that the authority cited for such rulemaking is Section 13-712 of the Act, which was enacted by Public Act 92-22 (House Bill 2900), effective June 30, 2001. IBEW asserts that Public Act 92-22 did not grant authority for the Commission to adopt by rule a "strike or other work stoppage" exemption/waiver from the service quality standards set forth in Section 13-712 of the Act. IBEW states that neither Section 13-712 nor any provision of Public Act 92-22 even mentions the words "strike" or "work stoppage."

IBEW asserts that the development of House Bill 2900 was the result of significant efforts on the part of many interest groups, trade associations, legislative staff, legislators, municipalities, consumer groups, and governmental agencies, including the Commission. Copies of the transcripts of the Senate and House Debates on House Bill 2900 were attached to IBEW's initial brief as Attachments A and B, respectively. IBEW states that the House and Senate debates on House Bill 2900 do not mention the issue of an exemption or waiver from the service quality standards in the event of a strike or other work stoppage. IBEW states that it is noteworthy that other legislation introduced during the very same session of the General Assembly contained an exemption from the service quality standards for strikes. IBEW indicates that such legislation (Senate Bill 582) failed to obtain approval of the Telecommunications Subcommittee of the Senate Environment and Energy Committee, and was not passed by the General Assembly. IBEW states that if the General Assembly intended to create an exemption or waiver from the service quality standards for a strike or other work

stoppage (other than the exceptions set forth in Section 13-712(g) of the Act, the General Assembly could have and would have done so.

GCP supports IBEW's position and asserts that Section 13-712(e)(6)(iii) of the Act does not provide the Commission with unlimited discretion to define an "emergency situation."

In response to IBEW, Verizon notes that Section 13-712(e)(6)(iii) provides:

> (6) Credits required by this subsection do not apply if the violation of a service quality standard:
>
> (iii) occurs as a result of, or is extended by, *an emergency situation as defined in Commission rules;*
> (emphasis added by Verizon)

Verizon asserts that this language is clear and unambiguous. Verizon states that the legislature has given the Commission substantial discretion to define "emergency situation." Verizon states that the Commission has concluded, based on its experience, expertise and the evidentiary record, that strikes and work stoppages fall within the definition of emergency situation.

Verizon asserts that IBEW position fails for two reasons. First, IBEW inappropriately turns to legislative history, rather than the plain language of Section 13-712. Verizon indicates that where statutory provisions are clear and unambiguous, the plain language as written must be given effect, without reading into it exceptions, limitations or conditions that the legislature did not express. IBEW v. Illinois Commerce Comm'n, 2002 WL 1376128, 772 N.E. 2d 340. Verizon notes that the Illinois Supreme Court has stated:

> …our inquiry must always begin with the language of the statute, which is the surest and most reliable indicator of legislative intent. The language of the statute must be given its plain and ordinary meaning, and where the statutory language is clear and unambiguous, we have no occasion to resort to aids of construction.
>
> People v. Pullen, 192 Ill.2d 36, 42, 248 Ill.Dec. 237, 733 N.E.2d 1235 (2000).

Second, even assuming, *arguendo*, that legislative history should be reviewed, such history provides no basis to support the IBEW's position. Verizon emphasizes that the legislative history is silent as to what should be included as an "emergency situation." Verizon asserts that this silence is consistent with the express language of Section 13-712, which allows the Commission to determine the definition. Verizon indicates that if IBEW's position is taken to its logical conclusion, no event could fall within the definition of "emergency situation" since no event was discussed in legislative history. Verizon states that such a result would be absurd and contrary to law. People v. Pullen, 192

Ill.2d 36, 42, 248 Ill.Dec. 237, 733 N.E.2d 1235 (2000) ("…we must assume that the legislature did not intend an absurd or unjust result.…The language of the statute must be given its plain and ordinary meaning.").

ITA's response to IBEW is similar to Verizon's response. ITA states that the fundamental principle of statutory construction is to ascertain and give effect to the legislature's intention, and that inquiry appropriately begins with the language of the statute. Bowne of Chicago v. Human Rights Com'n, 301 Ill.App.3d 116, 119-20, 703 N.E.2d 443, 445 (1st Dist. 1998). ITA indicates that if the statutory language is clear, it must be given effect without resorting to any extrinsic aids for guidance. Id. ITA states that only where a statute is ambiguous is it proper to consider aids, including legislative history and remarks made by legislators during debate on the legislation. Id. ITA asserts that the language in Section 13-712(e)(6)(iii) is clear and unambiguous. In addition, ITA asserts that IBEW reads far too much into the absence of the words "strike or work stoppage" in the legislative record which it has provided. ITA states that the absence of a specific reference to strikes in the legislators' final statements before each house does not mean that they specifically intended that the term "emergency situation" exclude strikes and work stoppages. ITA asserts that if the legislature had intended to restrict the Commission in this regard, such an intent would have been clearly stated.

IBEW states that under the rule adopted in Docket 01-0485, "the first 90 calendar days of a strike or other work stoppage" falls within the definition of a "single event." IBEW notes that the rule's definition of "emergency situation" provides that the duration of an emergency situation "shall begin with the first end user whose service is interrupted by the single event and shall end with the restoration or installation of the service of all affected users." 83 Ill. Adm. Code 732.10. IBEW asserts that if the "single event" is "the first 90 days of a strike or other work stoppage," the duration of the emergency situation (and, consequently the period of time during which a local exchange carrier's ("LEC") non-performance of the service quality standards is waived) may be for a period of time well in excess of the first 90 days of a strike or other work stoppage. To illustrate this point, IBEW provides the following example. On Day 1, 100 customers of a LEC request installation or repair service covered by Part 732. On Day 2, a strike begins and continues uninterrupted for the next 100 days. On Day 91, the single event (the first 90 days of the strike) expires. The "emergency situation" (and consequently, the period of time during which the affected LEC's non-performance of the service quality standards is waived) would not end until the restoration of or installation of service to all 100 customers has been accomplished. IBEW further states that the rule does not establish a timeframe within which such services must be installed or restored after the expiration of the first 90 calendar days of a strike or other work stoppage. IBEW concludes that this example demonstrates that the rule would result in an absurd policy which the General Assembly neither authorized nor intended. While IBEW's argument is interesting, the Commission notes that it is not responsive to the question that the parties were directed to address.

G. AG's Position

AG asserts that it is a fundamental canon of statutory construction that, "Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." McNutt v. Board of Trustees of University of Illinois, 141 F.3d 706 at 709 (7th Cir.1998). Similarly, AG indicates that Illinois courts have held that the presence of language in one section of an Act and absence of similar language in another section can be used to determine the intent of the General Assembly. For example, AG states that in Freeman United Coal Mining Co. v. Industrial Comm'n, 99 Ill.2d 487 at 497 (Ill.2d 1984), the Court applied this principle and said that: "Had this been the legislature's intent, it would have been a simple matter to either include language to that effect in the text of that section or to omit the singular wording in section 8(e)(17)."

AG states that the General Assembly included a comprehensive list of situations which exempt a carrier from paying customer credits for service quality lapses. AG notes that Section 13-712(e)(6) of the Act specifies seven exemptions, but work stoppages are not included. In contrast, AG indicates that Section 13-801 of the Act, which establishes carrier to carrier requirements, includes work stoppages in its list of events to be excluded in evaluating carrier performance. AG notes that Section 13-801(d)(5) provides:

> In measuring the incumbent local exchange carrier's actual performance, the Commission shall ensure that occurrences beyond the control of the incumbent local exchange carrier that adversely affect the incumbent local exchange carrier's performance are excluded when determining actual performance levels. Such occurrences shall be determined by the Commission, but at a minimum must include work stoppage or other labor actions and acts of war.

AG asserts that the omission of work stoppages from the list of exemptions found in Section 13-712(e)(6) demonstrates the General Assembly's intent that such an exemption is not necessary to fairly balance the rights and obligations created by that section. AG concludes that since the General Assembly did not intend that a strike or work stoppage constitute an exemption, the Commission's rules should not contradict that intent by including strikes or work stoppages as emergency situations that rise to the level of an exemption.

In response, ITA states that AG's argument ignores the clear language in Section 13-712(e)(iii) which grants authority to the Commission to define, without any statutory limitation, what are "emergency situations." ITA asserts that it defies common sense to conclude that since "work stoppages and other labor actions and acts of war" are included in Section 13-801 of the Act and are not referenced in Section 13-712(e)(6)(iii), strikes or work stoppages cannot be included in the Commission's definition of "emergency situation."

ITA states that McNutt v. Board of Trustees of University of Illinois, 141 F.3d 706 (1998), which is cited by the AG, is inapposite and clearly distinguishable from the facts in this case. ITA states that in McNutt, the statute specifically changed the law with respect to certain specifically enumerated employment practices to the mutual exclusion of all others. In contrast, ITA indicates that here, the two statutes (Sections 13-801 and 13-712) are not mutually exclusive. ITA states that Section 13-801 is a provision that promotes the development of competition, while Section 13-712 is a provision that protects consumers. ITA notes that Section 13-801(d)(5) addresses the provision of unbundled network elements by incumbent local exchange carriers ("ILECs") to competitive local exchange carriers ("CLECs"), while Section 13-712 addresses service quality standards for service provided by local exchange carriers to their customers. ITA asserts that the fact that the legislature referred to work stoppages and other labor actions in Section 13-801 as being events that are specifically beyond a carrier's control does not mean that those same events cannot be considered "emergency situations" under Section 13-712. ITA states that taken to its logical conclusion, the argument of the AG would lead to the absurd result that an "act of war" (which is specifically enumerated as an exemption under Section 13-801) could not be an "emergency situation" under Section 13-712 because it was not mentioned in Section 13-712.

ITA notes that the other case cited by the AG, Freeman v. The Industrial Commission, 99 Ill.2d 48, 459 N.E.2d 1368 is a worker's compensation case. ITA states that in Freeman, the Supreme Court held that a person who was collecting a pension under one statutory criteria for complete disability from the amputation of both his legs could recover benefits under another statutory criteria for full temporary total disability after having returned to work in a different capacity, without a setoff between the two benefits. ITA indicates that in Freeman, the Court refused to read into the statute a mechanism to create such a setoff because the purposes of the two statutory criteria were different, and the legislature had created a setoff for one but not the other. ITA states that the two statutes that have been placed at odds by the AG's argument are not mutually exclusive, and the exemptions contained in each are not stated in statutory terms so as to be exhaustive. Therefore, the ITA concludes that the AG has misapplied the principles from Freeman.

Staff asserts that the AG's statutory construction argument does establish that the legislature intended to preclude a work stoppage exemption from the service quality standards. Staff indicates that in Section 13-801(d)(5) of the Act, the General Assembly granted the Commission the discretion to determine occurrences that would be excluded from the measurement of the performance levels of ILECs. Staff notes, however, that the legislature limited the Commission's discretion in Section 13-801(d)(5) by stating explicitly that such occurrences "at a minimum must include work stoppage or other labor actions . . . ." Staff concludes that the discernable intent of the legislature from the presence of the work stoppage language in § 13-801(d)(5) and the absence of similar language from § 13-712 is that the legislature intended to grant the Commission full discretion in defining "emergency situation."

Staff indicates that the cardinal rule of statutory construction, to which all other canons and rules are subordinate, is that a statute must be construed to ascertain and give effect to the intention of the General Assembly. In re Estate of Dierkes, 191 Ill. 2d 326, 331 (2000). Staff states that the language of the statute, moreover, is generally the best indicator of what the legislature intended. Phoenix Bond & Indemnity Co. v. Pappas, 194 Ill. 2d 99, 106 (2000).

Staff states that the language of Section 13-712(e)(6)(iii) is clear. Staff states that the General Assembly expressly authorized the Commission to define Emergency Situation, in its discretion, in its rules. Staff indicates that the Commission, in exercising its discretion, is given wide latitude in promulgating such rules and regulations as are necessary to carry out the intent of the legislation. Gersch v. Illinois Dep't of Prof'l Regulation, 308 Ill. App. 3d 649, 658 (Ill. App. Ct. 1st Dist. 1999), appeal den'd, 187 Ill. 2d 567 (2000) ("[A]dministrative agencies are to be given wide latitude in determining what actions are reasonably necessary, and a court may not overturn an agency policy or action simply because the court considers the policy unwise or inappropriate."). Staff concludes that the canon of statutory construction relied on by AG is inapplicable due to the General Assembly's expression of its clear intent in Section 13-712(e)(6)(iii).

H. Commission's Conclusion

Section 13-712(e)(6)(iii) of the Act provides:

> (6) Credits required by this subsection do not apply if the violation of a service quality standard:
>
> (iii) occurs as a result of, or is extended by, an emergency situation as defined in Commission rules.

Section 13-712(e)(6)(iii) is clear and unambiguous. It provides the Commission with express authority to define "emergency situation" in a manner it deems best.

The Illinois Supreme Court stated:

> …our inquiry must always begin with the language of the statute, which is the surest and most reliable indicator of legislative intent. The language of the statute must be given its plain and ordinary meaning, and when the statutory language is clear and unambiguous, we have no occasion to resort to aids of construction.

People v. Pullen, 192 Ill. 2d 36, 42, 248 Ill. Dec. 237, 733 N.E. 2D 1235 (2000)

Since the language in Section 13-712(e)(6)(iii) clearly provides the Commission with unrestricted discretion to define "emergency situation," the Commission concludes that this Section does not preclude the Commission from including in Part 732 an

exemption from the requirements of that rule in the event of a strike or other work stoppage.

Since the language Section 13-712(e)(6)(iii) is clear and unambiguous, it is unnecessary to review the legislative history of Public Act 92-22, which enacted Section 13-712 of the Act.

III. IS THE COMMISSION PREEMPTED BY FEDERAL LABOR LAW FROM PROMULGATING A RULE (PART 732) THAT WOULD GRANT A CARRIER AN EXEMPTION FROM OBLIGATIONS UNDER THAT RULE IN THE EVENT OF A STRIKE OR OTHER WORK STOPPAGE?

A. ITA's Position

ITA contends that this preemption question is not the proper question. ITA asserts that the inclusion of strikes or work stoppages as an "emergency situation" in Part 732 cannot be viewed in a vacuum. ITA asserts that the appropriate legal question is whether the newly enacted customer credit requirements under Section 13-712 of the Act as interpreted by the Commission interferes with the collective bargaining process, such that Section 13-712 is preempted by the National Labor Relations Act. 29 U.S.C. 151 et, seq., ("NLRA"). ITA indicates that an administrative rule should be construed together with the statute it implements so as to make an effective piece of legislation which is in harmony with common sense and sound reason. Strube v. Illinois Pollution Control Bd., 242 Ill. App. 3d 822, 828, 610 N. E. 2d 717, 721 (3d Dist. 1993). ITA states that if Section 13-712 interferes with the collective bargaining process, both Section 13-712 and Part 732 are preempted. ITA states that if Section 13-712 does not interfere, neither Section 13-712 nor Part 732 are preempted.

ITA states that the State of Illinois is preempted by the NLRA from interfering with the collective bargaining process between employers and employees. ITA indicates that the national policy established by the NLRA is not to compel agreement between employees and employers, but rather to encourage the making of voluntary agreements arrived at after good faith bargaining between unions and employers. General Electric Co. v. Callahan, 294 F.2d 60, 67 (1st Cir. 1961) ITA asserts that the theory behind this policy is that the making of voluntary labor agreement is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.

ITA states that the evidence in Docket 01-0485 clearly showed that a local exchange telecommunications carrier cannot physically meet the timelines in Section 13-712 of the Act and Part 732 during a strike because it will have lost its work force. Thus, ITA indicates that the only way to avoid the penalties is to settle the strike. ITA asserts that the only reason for imposing the customer credits and direct payments to customers during a strike is to induce the carrier to settle the strike. ITA states that the customer credit penalties have no value as an incentive for the carrier to properly plan and staff during a strike situation. ITA indicates that carriers cannot legally stop their

employees from forming a union. ITA notes that if the carrier is a union shop, all employees will be members of the union. ITA asserts that it will not matter how many extra employees the carrier has hired in order to meet the required timelines. ITA states that if the union goes out on strike, the carrier's entire work force will be gone. ITA states that while there will inevitably be some management employees that have the training to perform technical tasks and there may be non-technical tasks that other managers can perform, the carrier will still not be able to plan to provide service to all affected customers and meet the timelines required by Section 13-712 and Part 732 during a strike.

ITA states that the Commission received evidence and legal arguments on this exact issue on rehearing in Docket 01-0145 and concluded as follows:

> As may be expected with questions of federal preemption, resolution of this issue was not easy. The Commission concludes, however, that it is not barred by the Supremacy Clause of the U. S. Constitution from granting LECs a waiver from the obligations of Part 732 when LECs are confronted with a strike or work stoppage.
>
> The NLRA was enacted to protect the collective bargaining process. Employers and employees must be free to bargain without pressure from governmental entities. The Commission finds that paying customer credits would unduly burden LECs that are faced with strikes. LECs that have lost their work force as the result of a strike should not and can not be expected to meet all of their obligations under Part 732. If required to pay customers credits during a strike or work stoppage, LECs may feel pressured to succumb to union demands and settle the strike to avoid paying credits. Because of the pressure to settle that LECs may feel, the Commission finds that Part 732 would interfere with the collective bargaining process and thus violate the Supremacy Clause. Accordingly, the burden which LECs must endure when faced with a strike or work stoppage, NLRA sanctioned economic weapons, should not be aggravated but instead should be ameliorated by granting such LECs a temporary waiver from the otherwise generally applicable obligations of Part 732. The duration of the waiver should be 90 calendar days, beginning on the day that a strike or work stoppage begins. The Commission finds that an exemption of this duration sufficiently balances the interests of LECs and customers. (April 30, 2002 Interim Order on Rehearing, pp. 28-29).

ITA concludes that the Commission's adoption of the 90 calendar day exemption for strikes and work stoppages should be reaffirmed.

ITA asserts that the issue here is substantially similar to the issue decided by the United States Court of Appeals for the Seventh Circuit in Cannon v. Edgar, 33 F.3d 880 (7th Cir. 1994), wherein the Court found the Illinois Burial Rights Act to be preempted by

the National Labor Relations Act and therefore unconstitutional in violation of the Supremacy Clause. ITA states that the Illinois Burial Rights Act would have imposed sanctions, including money damages and attorneys fees, for failure to sign a labor pool agreement to perform religiously required burials during strikes and lockouts. ITA indicates that if a strike occurs, Section 13-712 will give the telecommunications carrier the same choice that the gravediggers had in Cannon: settle or face penalties for not meeting the timelines. ITA states that the record in Docket 01-0485 showed that those penalties could add up to staggering amounts for even a reasonably short strike. ITA indicates that the only way that a carrier can avoid the penalties is to settle the labor dispute or find sufficiently trained replacement workers. ITA states that the record in Docket 01-0485 showed that trained replacement workers are not readily available in the telecommunications industry because of the technical nature of the tasks to be performed, and that training will take longer than the average strike.

B. Ameritech's Position

Ameritech asserts that the Commission was correct in concluding in its April 2, 2002 Order on Rehearing in Docket No. 01-0485 that "it is not barred by the Supremacy Clause of the U.S. Constitution form granting LECs a waiver from the obligations of part 732 when LECs are confronted with a strike or work stoppage." Ameritech indicates that state utility regulations have generally been found not to be preempted where they have only a secondary impact on the collective bargaining process. Ameritech states that the key inquiry is whether "the Commission's order encroaches upon either party's ability to use economic pressure in future negotiations to gain concessions from the other." Southwestern Bell Telephone Co. v. Arkansas Public Service Comm'n, 824 F.2d 672, 675 (8th Cir. 1987). Ameritech states that where the utility remains free to resist the union's demands, the union remains free to strike, and the Commission's order does not preclude the utility and the union from complying with their collective bargaining agreement, there is no preemption. Southwestern Bell, 824 F.2d at 675.

Ameritech asserts that the Commission's decision to permit a work stoppage exception easily passes this test. Ameritech indicates that the Commission's decision does not prevent either party from exercising its collective bargaining rights. In particular, Ameritech states that the union remains free to strike, and the strike would continue to exert precisely the same leverage on the carrier as it did before Part 732 or Section 13-712 existed. Ameritech asserts that the only effect of the Commission's decision on the "economic pressure" that may be brought to bear by the union results from the Commission declining to impose the additional costs of customer credits on the carrier during a strike of up to 90 days. Ameritech emphasizes that this source of economic pressure, however, is not even a part of the collective bargaining process. Rather, Ameritech indicates this source of economic pressure is entirely a product of Part 732 and Section 13-712. Thus, Ameritech concludes that declining to impose those credits during a strike does not interfere with the parties' ex ante bargaining positions. In summary, Ameritech indicates that Part 732, as currently drafted, leaves labor and management in exactly the same position they were in before Part 732 (and

Section 13-712) existed, except that labor's leverage would increase after 90 days if a work stoppage were to continue for that long.

In response, GCI contends that the work stoppage and strike exemption does not leave carriers, employees or consumers in the same position during a strike as at other times. GCI states that under the rule being reviewed, carriers are relieved of otherwise applicable obligations because of the strike. GCI states that being relieved of these obligations frees up money and resources for carriers' use in withstanding the strike, while consumers are left without a remedy that the General Assembly specifically provided in Section 13-712 of the Act. GCI indicates that the effect of labor's use of a work stoppage or strike is moderated because the exemption cushions carriers against a strike's effect.

GCI asserts that Ameritech has misconstrued the standard for NLRA preemption. GCI states that following Ameritech's logic, all regulations passed subsequent to the NLRA with any conceivable effect on employee benefits or relations would be preempted. GCI indicates that the NLRA preemption is not as broad as Ameritech suggests. GCI states that the NLRA preemption leaves much regulatory discretion to the states and permits regulation, "that may have an indirect impact on labor relations but does not deal substantially with labor issues." Metropolitan Life Insurance Company v. Massachusetts Travelers Insurance Company, 471 U.S. 724, 757 (1985).

GCI indicates that state regulation can make changes that have indirect effects on potential parties to labor negotiations. Southwestern Bell (Decrease in amount telephone company could collect from ratepayers for wages and benefits is not preempted); Massachusetts Nurses Association v. Dukakis, 726 F.2d 41 (1st Cir. 1984) (Price Control Program with an indirect effect on labor-management relations is not preempted). Consequently, GCI states that Ameritech's suggestion that the NLRA preempts the position of potential parties to a labor dispute, and, therefore, that the strike exemption is required, is not supported by case law.

C. Verizon's Position

Verizon states that under the Garmon preemption doctrine, the NLRB, not the states has jurisdiction to regulate collective bargaining. Verizon indicates that the Garmon preemption, first articulated by the United States Supreme Court in San Diego Blg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959), "forbids state and local regulation of activities that the NLRA protects or prohibits or arguably protects or prohibits." Cannon v. Edgar, 33 F.3d 880, 884 (7th Cir. 1994) (citing Building and Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, 507 U.S. 218 (1993)). Verizon states that the Garmon doctrine prevents conflicts between state and local regulation and the federal regulatory scheme embodied in the NLRA. Cannon, 33 F.3d at 884. Verizon notes that the Cannon court explained that the NLRA is an extensive statutory scheme that regulates the collective bargaining relationship between employers and unions. Cannon, 33 F.3d at 883. Verizon indicates that the NLRA, among other things, enumerates unfair labor practices by both

employees and employers, and defines as an unfair labor practice the refusal by an employer to bargain collectively with a labor union representing its employees. Verizon notes, however, that the NLRA, does not require that the parties reach agreement. Cannon, 33 F.3d at 884. Rather, Verizon indicates that with the exception of requiring parties to bargain in good faith, 29 U.S.C. §158(a)(5), the NLRA allows parties to conduct the bargaining process free of government intrusion. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 616 (1986), cited in Cannon, 33 F.3d at 883-84.

Verizon asserts that nothing within the NLRA prohibits the Commission from determining that an emergency situation, as allowed for under Section 13-712(e)(6)(iii), includes strikes or work stoppages. Verizon states that the Commission in Docket 01-0485 recognized that such an event would impact a carrier's ability to provide service by exempting a strike or work stoppage from being subject to a credit requirement for a period of 90 days in Part 732.

Verizon indicates that absent Section 13-712, the specific credit requirements found in Part 732 would not exist and a carrier would be under no obligation to pay such credits in the event of a strike or work stoppage. Therefore, Verizon contends that there is no basis to conclude that because Part 732 does exist, such credits must be paid even when a strike or work stoppage takes place. Verizon indicates that such a result would violate the Garmon doctrine since it would alter the balance between management and labor in their negotiations, to the undue benefit of labor. Verizon concludes that if the Commission failed to include strikes or work stoppages as emergency situations and required carriers to pay credits during such events, the NLRA would be violated.

In response, IBEW asserts that federal law does not mandate an unlimited strike or work stoppage exemption from Part 732. IBEW states that there are many examples of Illinois statutes and regulations which impose civil penalties for a regulated entity's failure to comply with a specific time frame mandated by statute and/or regulation. For example, IBEW indicates that the Illinois Environmental Protection Act, as well as the rules adopted by the Illinois Pollution Control Board implementing that Act, require that owners and operators of underground storage tanks file reports and undertake corrective and remedial action within specified timeframes in the event of a "release" of fuel from an underground storage tank. (415 ILCS 5/57 et seq.; and 35 Ill. Adm. Code 732.100 et seq.) IBEW states that failure to comply with these statutory and regulatory requirements within the specified time frames constitutes a violation of the Act and the Board's rules, both of which subject the violator to penalties and enforcement actions.

GCP asserts that Verizon's position that failure to include an exemption for strikes or work stoppages would violate the Garmon doctrine reflects a tortured reading of Garmon. GCP states that Garmon simply prevents states from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 286, 106 S. Ct. 1057, 1061, 89 L.Ed.2d 223 (1986). GCP indicates that the activity in question, the payment of credits to customers,

is not conduct that is protected or prohibited by the NLRA. GCP states that the NLRA has no jurisdiction over the decision to mandate payments of customer credits. GCP contends that Verizon tries to make this consumer protection issue a labor/management dispute.

In addition, GCP indicates that Verizon fails to mention the exceptions to the Garmon doctrine. GCP states that the exceptions provide that regulated activity is not preempted if it is: (1) merely peripheral to the federal labor laws or (2) touches interests deeply rooted in local feeling and responsibility. Belknap, Inc. v. Hale, 463 U.S. 491, 498 (1983) citing Garmon, 359 U.S. at 243, Sears Roebuck & Co. v. Carpenters, 436 U.S. 180, 200, and Farmer v. Carpenter, 430 U.S. 290, 296-297. GCP asserts that under this test, the matter of payment of credits to customers is, at best, of merely peripheral concern to labor issues. Further, GCP indicates that, given the recent public uproar and legislative reaction with regard to the quality of telephone service in Illinois, as well as the long-standing recognition of state responsibility for insuring reliable and quality local telephone service, the issues covered by Part 732 are clearly a matter deeply rooted in local feeling and responsibility.

GCP indicates that states are free to regulate in ways that are unrelated to, or will have only indirect effects on, the concerns of the NLRA. Metropolitan Life Insurance Company v. Massachusetts Travelers Insurance Company, 471 U.S. 724, 757 (1985); Southwestern Bell Tel. C. v. Arkansas Public Service Comm'n, 824 F.2d 672, 675 (8th Cir. 1987). GCP asserts that Part 732 is an example of such a regulation. GCP notes that Part 732 addresses telephone service quality and establishes a customer compensation scheme as mandated by the General Assembly. GCP states that the substantive provisions of Part 732 are wholly unrelated to labor relations, and are not preempted by the NLRA even if the definition of emergency situation fails to include strikes.

D. Staff's Position

Staff notes that federal presumption is generally a question of the intent of Congress. Fidelity Federal Savings & Loan v. De la Cuesta, 458 U.S. 141, 152-153 (1992). Staff states that if there is no express statement by Congress that state law is preempted, there are two other bases upon which courts may find preemption. Staff states that the first basis, referred to as field preemption, occurs when Congress intends that federal law occupy a given field, which would result in state law in that field being preempted. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n, 461 U.S. 190, 212-213 (1983). Staff indicates that the second basis, referred to as conflict preemption, occurs even if Congress has not occupied the field. Staff states that state law, nevertheless, is pre-empted to the extent it actually conflicts with federal law; that is, when compliance with both state and federal law is impossible (Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312

U.S. 52, 67 (1941). See, e. g., Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

Staff indicates that when Congress legislates in an area traditionally regulated by the states, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Consequently, Staff states that a party arguing for federal preemption of the Commission's authority to regulate intrastate telecommunications must overcome a presumption against finding preemption of state law in areas traditionally regulated by the States. Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 716 (1985).

Staff indicates that while the above-noted federal preemption principals apply to the field of labor law, there are notable distinctions in the field of labor law. Staff states that Section 7 of the NLRA grants to employees the substantive right, among other rights, to band together with co-employees for the purpose of collectively bargaining with their employers. Thus, Staff indicates that labor preemption does not solely depend upon the theory of primary jurisdiction, but rather also depends upon the substantive rights that the NLRA granted employees in Section 7, which are enforced in Section 8 of the NLRA.

Staff notes that Section 7, however, contains neither explicit preemptive language nor otherwise indicates a congressional intent to occupy the entire field of labor-management relations. New York Telephone Co. v. New York State Dept. of Labor, 440 U.S. 519, 540 (1979); Garner v. Teamsters, 346 U.S. 485, 488 (1953) ("The national ... Act ... leaves much to the states, though Congress has refrained from telling us how much"). Accordingly, Staff indicates that courts are reluctant to find preemption because the NLRA contains no express preemption provision. Colfax v. Illinois State Toll Highway Authority, 79 F.3d 631, 633 (7th Cir. 1996) ("Because the NLRA contains no express preemption provision, courts are reluctant to infer preemption."). Staff notes, however, that courts have frequently applied traditional preemption principles to find state law barred on the basis of an actual conflict with Section 7. Consequently, Staff indicates that if employee conduct is protected under Section 7, state law that interferes with the exercise of these federally protected rights creates an actual conflict and is preempted by direct operation of the Supremacy Clause. Bus Employees v. Missouri, 374 U.S. 74, 81-82 (1963) (striking down state statute prohibiting peaceful strikes against public utilities); Bus Employees v. Wisconsin Board, 340 U.S. 383, 394 (1951) (same); Automobile Workers v. O'Brien, 339 U.S. 454, 458-459 (1950) (invalidating state "strike-vote" legislation).

Staff states that the United States Supreme Court has adopted two distinct preemption doctrines in the area of federal labor law: the Garmon preemption and the Machinists preemption. Staff indicates that the Garmon preemption forbids state and local activities that interfere with the rights granted employees under Section 7 of the NLRA or which constitute unfair labor practices under Section 8. San Diego Bldg.

Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959). Staff states that the Garmon preemption doctrine is intended to preclude state interference with the Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) (internal citation omitted). Staff indicates that the Garmon preemption "prevents states not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies." Wisconsin Dept. of Indus. v. Gould, 475 U.S. 282, 286 (1986).

Staff states that the Garmon preemption has attributes similar to conflict preemption in that it will preempt any local regulation that is inconsistent with the substantive rights granted employees under Section 7 of the NLRA. Staff indicates that the Garmon preemption is also somewhat akin to field preemption in that the NLRB will not countenance any competing interpretation or enforcement of the regulatory scheme embodied in the NLRA.

Staff notes that Part 732 addresses service quality standards for telecommunications carriers providing retail local exchange service. Staff indicates that Part 732 does not interfere with employees' rights to organize, does not set a time limit on collective bargaining negotiations or any subsequent work stoppage that may emanate from failed collective bargaining, and does not dictate the outcome of such collective bargaining negotiations. Staff also indicates that the NLRA does not address telecommunications carriers' local service quality standards, let alone consumer credits, or exemptions to consumer credits, when standards are not met. Consequently, Staff concludes that there is no actual direct conflict between Part 732, as adopted by this Commission, and the NLRA.

Staff notes, however, that the Garmon preemption is not absolute. Staff states that the Supreme Court has articulated two notable exceptions to the Garmon doctrine. State or local regulation is not preempted if: (1) the activity regulated is merely of a peripheral concern to the federal labor laws; or (2) if the conduct touches interests so deeply rooted in local feeling that preemption cannot be inferred absent compelling congressional direction. Garmon, 359 U.S. at 243-244; Talbot v. Robert Matthews Distributing Co., 961 F.2d 654, 660-61 (7th Cir. 1992). Staff states that in reaching a decision of whether either of these exceptions apply, the court "must balance the state's interest in remedying the effect of the challenged conduct against both the interference with the NLRB's ability to adjudicate the controversy and the risk that the state will approve conduct that the NLRA prohibits." NLRB v. State of Ill. Dept. of Employment Sec., 988 F.2d 735, 739 (7th Cir. 1993)(citing Kolentus v. Avco Corp., 798 F.2d 949, 961 (7th Cir. 1986), cert. denied, 479 U.S. 1032 (1987)).

Staff contends that a definition of "emergency situation," which would include an exemption from paying customer credits during the first seven days of a strike or work stoppage, meets both exceptions to the Garmon preemption doctrine. First, Staff contends that this limited exemption from paying customer credits would be peripheral to the concerns of the NLRA. Staff notes that the NLRA does not even touch upon

telecommunications regulation. Staff also indicates that this limited exemption does not directly affect either labor or management's relative positions in collective bargaining negotiations, although it may have an indirect effect on a work stoppage.

Second, Staff notes that the provisioning of local exchange telecommunications services has been regulated by the State far longer than the NLRA has even been in existence, thereby demonstrating its deep roots in local state responsibility. Staff states that federal courts have concluded that exceptions to the Garmon preemption apply to matters of general state law, particularly matters that touch upon a state's police powers. Farmer v. United Broth. of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 292 (1977) (Court held that the NLRA did not preempt state tort action for intentional infliction of emotional distress because it was unrelated to the collective bargaining process that Congress intended to regulate when it passed the NLRA); Belknap v. Hale, 463 U.S. 491, 512 (1983) (NLRA does not preempt state law action for misrepresentation and breach of contract by replacement worker against employer); Sears v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (NLRA does not preempt state law trespass action); Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 55 (1966) (State law action for defamation is not preempted by the NLRA); Kehr v. Consolidated Freightways, 825 F.2d 133 (7th Cir. 1987) (NLRA does not preempt action for intentional infliction of emotional distress). Staff states that telecommunications regulation, like criminal and tortuous conduct falls under the broad category of subject matter traditionally covered by state general law, and thus falls under the second Garmon exception.

Staff also indicates that a rule which provided no exemption from customer credits during the period of a strike or work stoppages would clearly not be preempted under Garmon.

Staff indicates that the Machinists preemption prohibits states and local regulation of areas that have been left "to be controlled by the free play of economic forces." Lodge 76, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 140 (1976)(quoting NLRB v. Insurance Agents' Intern. Union, AFL-CIO, 361 U.S. 477, 488 (1960)); see also Building and Const. Trades Council, 507 U.S. at 225. Staff states that the Machinists preemption attempts to preserve the balance between the power of management and labor that Congress intended to further their respective interests by use of their respective economic weapons, which are part and parcel of the collective bargaining process. Building and Const. Trades Council, 507 U.S. at 226.

Staff states that the Machinist preemption doctrine, like the Garmon preemption doctrine, has its exceptions. Staff indicates that the Supreme Court explained that the issue in a Machinist preemption case is:

> Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding pre-emption is the same: whether the exercise of plenary state authority to curtail or entirely prohibit self-help

> would frustrate effective implementation of the Act's processes. (Machinists at 147-148)

Staff contends that a limited exemption from paying customer credits would not be preempted under Machinist*s* because it would not "curtail or entirely prohibit self help" in a manner that "would frustrate effective implementation of the Act's processes." Staff asserts that both the carriers and their organized workforces would remain free to enter into the collective bargaining process and enjoy all the rights they are entitled to under the NLRA.

Staff indicates that courts in a wide variety of cases have left intact state laws, decisions, and regulations that may have some effect on the collective bargaining relationship. For example, Staff notes that in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 (1985), the Supreme Court recognized that it "cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States.'") (internal citations omitted).

Staff asserts that courts have explicitly found that telecommunications regulations were not preempted despite an acknowledged indirect effect on the collective bargaining relationship. Staff states that in Southwestern Bell Tel. Co. v. Arkansas Public Service Commission, 824 F.2d 672 (8th Cir. 1987), the court considered whether the Arkansas Public Service Commission acted properly in reducing the expenses that a public utility could recover for wages and benefits that were the result of collective bargaining. Staff indicates that Southwestern Bell argued that the commission's action in reducing the recoverable expenses was preempted by the NLRA because of its effect on the collective bargaining process. Staff states that the court, in rejecting the LECs preemption arguments, recognized that "a tension exists between federal labor laws protecting the collective bargaining process and state laws charging regulatory bodies with the task of assessing the reasonableness of a public utility's expenses, rates, and revenues." Southwestern Bell at 674. Staff notes that the court, nonetheless, concluded that the state commission's reduction of the company's recoverable expenses did not impermissibly intrude on the collective bargaining process and was not preempted under either Garmon or Machinists. Staff adds that the court noted that the commission's order had no relation to the substantive portions of the underlying collective bargaining agreement and thus did not encroach on federal enforcement of the National Labor Relations Act. Southwestern Bell at 674.

Staff indicates that the Eighth Circuit concluded that the commission's order was "not an intrusion on the economic self-help measures available to labor and management that Congress meant to be unregulated." Southwestern Bell at 674. Staff states that in rejecting the company's argument that the reduction of recoverable expenses would affect the negotiating process and alter the company's bargaining position, the court explained:

> Nothing in the Commission's order encroaches upon either party's ability to use economic pressure in future negotiations to gain concessions from the other. The Company remains free to resist the union's demands, and [the union] may authorize a strike if its terms are not met. Furthermore, the Commission has not vetoed the wage agreement. As we have already pointed out, the Company stipulated that notwithstanding the Commission's order, it is obligated to pay the bargained-for wages. Finally, nothing in the NLRA guarantees that wages agreed upon in collective bargaining will be recovered from consumers, whether the business is regulated or not. This, therefore, is not a case where either *Machinists* or *Garmon* preemption is appropriate. Southwestern Bell at 675

Staff contends that the same reasoning is applicable here. Staff asserts that a limited exemption (e.g., seven (7) days) from paying customer credits does not intrude on the duties and responsibilities of the NLRB, or compel a party's assent to any particular provision in a collective bargaining agreement. Staff states that a limited exemption would also have no relation to the substantive portion of a carrier's collective bargaining with its organized workforce. Indeed, Staff contends that a limited exemption would appear to have less effect on the LEC, and on the collective bargaining process, than the commission action at issue in Southwestern Bell.

Staff further contends that finding preemption of a limited exemption for work stoppages could threaten a wide variety of legitimate state regulations. Staff states that the Court of Appeals for the First Circuit addressed the implications of such an argument in Massachusetts Nurses Association v. Dukakis, 726 F.2d 41 (1st Cir. 1984). Staff states that in Massachusetts Nurses, the court rejected a challenge, made on preemption grounds, to a state law that established a method for reimbursing hospitals for their costs and that set a yearly amount the hospital could recover for patient care. The court explained:

> [I]n any industry the price of whose product or service--such as electric power, telephone, natural gas, or even rent-controlled real estate--is regulated, a state would find its regulatory system vulnerable to preemptive attack on the ground that the overall control of price was too inhibiting an influence on collective bargaining. Logic, however, would carry beyond simple price control. Any state or municipal program that substantially increased the costs of operation of a business in a competitive market would be similarly vulnerable to the preemption argument. Clean air and water laws, selective cutting requirements in forest operations, industrial safety standards, tax increases--all *pro tanto* hobble collective bargaining in that they constitute part of the universe in which collective bargaining takes place, just as do general prosperity or depression. But they do not add to or detract from the rights, practices, and procedures that together constitute our collective bargaining system. Massachusetts Nurses at 45

Staff argues that like the price control in Massachusetts Nurses, a limited work stoppage exemption (i.e., seven (7) days) from paying customer credits, while it may increase the costs of operation of a business, does not "add to or detract from the rights, practices, and procedures" that collectively constitute our collective bargaining processes. Staff also states that a rule without any exemption for strikes or work stoppages would clearly not be preempted under either Garmon or Machinists.

In conclusion, Staff contends that the inclusion of an exemption based upon work stoppages of a limited duration (e.g., seven (7) days) in the definition of "emergency situation" would not directly affect the negotiations between a carrier and its work force and thus would not be preempted; Staff indicates that such an exemption may, however, indirectly affect a work stoppage. On the other hand, Staff contends that a 90 day exemption for work stoppages (especially if the Commission permitted an emergency situation to extend for the full duration of a work stoppage) could have a direct effect on the collective bargaining balance between labor and management and would run the risk of being preempted by the NLRA. In other words, Staff believes that somewhere on a continuum, which would start from no exemption for work stoppages and end with an exemption that would last the full duration of any strike or work stoppage, lies a point where an exemption of limited duration would only have a peripheral effect on collective bargaining processes and thus not be preempted. Staff indicates that if such an exemption went on for a further time period, the exemption would have a direct effect on the collective bargaining processes and thus would be preempted. Staff states that it would be a difficult task to ascertain exactly at which point such an exemption would be preempted, particularly if the exemption would endure during most of the work stoppage period. Accordingly, Staff recommends that the Commission adopt either no exemption for work stoppages in the definition of "emergency situation" or a seven day limited exemption.

In response to the arguments of Ameritech, Verizon and ITA that a rule without an exemption for work stoppages would be preempted under the NLRA, Staff asserts that such an argument defies common sense and the substantial body of relevant Supreme Court case law. Staff states that this argument results in the conclusion that the Commission has no authority to regulate the local service quality provided by telecommunications carriers by imposing fines when carriers fail to meet specified standards, despite the fact that the Commission is authorized to do so in Section 13-712 of the Act.

Staff asserts that any requirements imposed by Part 732 constitute part of the universe in which collective bargaining takes place, but do not add to or detract from the collective bargaining process. Staff states that Part 732 may slightly influence the parties' collective bargaining strategy, but such influence would only have an indirect peripheral effect on the collective bargaining process.

Staff states that the fallacy of the position that no exemption for strikes or work stoppages would be preempted under the NLRA is clearly demonstrated in New York

Tel. Co. v. New York Dept. of Labor, 440 U.S. 519 (1979). Staff states that in New York Tel., the Court held that states may award unemployment compensation to the telecommunications carrier's employees out on strike, which would have the clear effect of enabling the strikers to maintain the strike for a longer duration than if they were not receiving the unemployment compensation. Staff states that in reaching its conclusion, the Court distinguished its case from Machinists because "the general purport of the program is not to regulate the bargaining relationships between the two classes but instead to provide an efficient means of insuring employment security in the State." New York Tel., 440 U.S. at 564. Staff asserts that like the state of New York in New York Tel., the Commission's intent in promulgating Part 732 is clearly not to regulate the bargaining relationship between a carrier and its organized workforce but, rather, is a rule of general applicability intended to regulate the local service quality that a carrier provides its customers.

Staff states that the Court in New York Tel. further explained the importance of this distinction in that:

> [The New York unemployment benefits program] is not a state law regulating the relations between employees, their union, and their employer, as to which the reasons underlying the preemption doctrine have their greatest force. Instead, as discussed below, the statute is a law of general applicability. Although that is not a sufficient reason to exempt it from preemption, our cases have consistently recognized that a congressional intent to deprive the States of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws directed specifically at concerted activity.

Id. at 564-65 (internal quotes and citations omitted.).

In response to Staff's position, GCI contends that Staff's proposed seven-day strike or work stoppage exemption is contradicted by Garmon. GCI states that relieving carriers from an regulatory exemption because of a strike or work stoppage is preempted by the NLRA.

GCI states that quality telephone service is a matter deeply rooted in local concern. GCI indicates that Staff seems to assert that providing the benefit to a carrier of a limited strike/work stoppage exemption is a matter of local concern. GCI states that relieving carriers' of their service obligations in times of strikes in not a matter deeply rooted in local concern. On the contrary, GCI states that such an exemption undermines the protections the General Assembly established for consumers.

GCI states that the Machinists preemption directly prohibits state regulation of areas that have been left to the free play of economic forces under the NLRA. GCI indicates that if Part 732 contains even the limited, seven day exemption suggested by Staff, one party would be given an advantage in the event of a strike or work stoppage in the form of relief from existing financial and regulatory obligations. GCI states that

funds and resources that would not otherwise be available to a carrier would become available to help it withstand the pressure of a work stoppage or strike, while consumers are left without the remedies specifically mandated by the General Assembly. GCI concludes that Staff's proposed strike exemption for Part 732 does not pass Staff's balancing test and the preemption tests articulated in Garmon and Machinists, and, therefore, is preempted by the NLRA.

E. IBEW's Position

IBEW asserts that the 90 day strike/work stoppage exemption in Part 732 adopted by the Commission in Docket 01-0485 is preempted by federal law, and is therefore null and void. IBEW states that this exemption constitutes a blanket waiver of an otherwise generally applicable regulatory requirement for LECs, the performance of the service quality standards mandated by Part 732 and Section 13-712 of the Act. IBEW maintains that the sole and specific intent of the 90 day strike/work stoppage exemption is to accommodate one party's (the employer's) response time resulting from the other party's (the union's) use of a lawful and NLRA sanctioned economic weapon (a strike). Further, IBEW asserts that this exemption constitutes state action which benefits one party; and creates such benefit to that party for, during, and after the negotiations of a collective bargaining agreement.

IBEW states that under the NLRA, the test for preemption is not whether a "shorter" strike/work stoppage exemption benefits the labor union or whether a "longer" strike/work stoppage exemption benefits the employer; rather, IBEW indicates that once it is determined that a blanket strike/work stoppage exemption of any duration impacts protected activity within and pursuant to the collective bargaining process, any state action impermissibly interferes with and is in conflict with the policy, purpose and intent of the NLRA. IBEW asserts that the 90 day strike/work stoppage exemption unconstitutionally interferes with the collective bargaining process. Garmon, 359 U.S. at 245; Cannon, 33 F.3d at 885-86. IBEW contends that this exemption is preempted by Garmon and Machinists, and fails to satisfy either of the Garmon exceptions.

IBEW notes that the Commission concluded in Docket 01-0485 that the Supremacy Clause of the U.S. Constitution does not bar the Commission from granting LECs a waiver from the obligations of Part 732 when LECs are confronted with a strike or work stoppage. IBEW states that the Commission's conclusion is based on the following rationale:

> The NLRA was enacted to protect the collective bargaining process. Employers and employees must be free to bargain without pressure from governmental entities. The Commission finds that paying customer credits would unduly burden LECs that are faced with strikes. LECs that have lost their work force as the result of a strike should not and can not be expected to meet all of their obligations under Part 732. If required to pay customers credits during a strike or work stoppage, LECs may feel pressured to succumb to union demands and settle the strike to avoid

> paying credits. Because of the pressure to settle that LECs may feel, the Commission finds that Part 732 would interfere with the collective bargaining process and thus violate the Supremacy Clause. Accordingly, the burden which LECs must endure when faced with a strike or work stoppage, NLRA sanctioned economic weapons, should not be aggravated but instead should be ameliorated by granting such LECs a temporary waiver from the otherwise generally applicable obligations of Part 732. The duration of the waiver should be 90 calendar days, beginning on the day that a strike or work stoppage begins. The Commission finds that an exemption of this duration sufficiently balances the interests of LECs and customers.

(April 30, 2002 Interim Order on Rehearing in Docket 01-0485, pp. 28-29) (Emphasis added by IBEW)

IBEW states that the Commission's conclusion is both puzzling and troubling. IBEW disagrees with the Commission's finding that "Part 732 would interfere with the collective bargaining process . . . ." IBEW asserts that the interference with the collective bargaining process is the Commission approval of a blanket waiver and excuse form the performance of the Part 732 service quality standards during the first 90 calendar days of a strike or other work stoppage. IBEW also notes that the Commission concluded that the burden of a strike or work stoppage, which is a sanctioned weapon under the NLRA, "should not be aggravated but instead should be ameliorated" by granting a temporary waiver from the obligations of Part 732. IBEW asserts that this statement is a clear admission of the Commission's purpose and intent to directly "tilt" or "adjust" a weapon sanctioned by the NLRA, and the clearest evidence of the Commission's intent to interfere with the collective bargaining process. IBEW asserts that a blanket "strike or other work stoppage exemption" of an unlimited duration is likewise an unwarranted intrusion into , and an improper interference with, the collective bargaining process, and as such is preempted by the NLRA.

In support of its position, IBEW states that in Garner v. Teamsters Local 776, 346 U.S. 485, 74 S.Ct. 161 (1953), the U.S. Supreme Court described the preemptive effect of the NLRB's exclusive jurisdiction under the NLRA:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confine primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies …. A multiplicity of tribunals and a diversity of procedures are quite as apt to

> produce incompatible or conflicting adjudications as are different rules of substantive law.
>
> Id., 346 U.S. at 490-91.

IBEW states that Section 7 of the NLRA sets forth the right of employees to organize and bargain collectively, while Section 8 sets forth prohibitions on conduct which constitute "unfair labor practices." (29 USC 157 and 158) IBEW states that in Garmon, the U.S. Supreme Court set forth an all-encompassing test based upon the NLRB's primary jurisdiction:

> "It is essential to the administration of the [National Labor Relations] Act that these determinations be left in the first instance to the National Labor Relations Board . . . . When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with National policy is to be averted.
>
> (Emphasis added by IBEW) (Garmon, 359 U.S. at 244-45)

IBEW indicates that the Garmon Court underscored the point that state regulation would be preempted even in an area where it might ultimately be concluded that the state regulation did not conflict with the federal scheme. IBEW states that the potential for conflict became the touchstone:

> "In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction . . . . The governing consideration is that to allow the State to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."
>
> Garmon, 359 U.S. at 246.

Thus, IBEW asserts that Garmon stands for the principle that potential, rather than actual, conflict is enough to require preemption. If conduct "is arguably within the compass of §7 or §8 of the NLRA, the State's jurisdiction is displaced." Garmon, 359 U.S. at 246. IBEW indicates that preemption of arguably protected or prohibited conduct is necessary because the federal scheme envisions a single tribunal regulating within, and shaping, a uniform national labor policy. In addition, IBEW indicates that state court jurisdiction over questions involving unsettled issues under the NLRA might result in interference with protected activity.

In response, Staff states that while the "arguably protect" language has been interpreted to result in a presumption favoring preemption, this presumption has been widely criticized and the Supreme Court has stepped back from this presumption.

IBEW states that if the Commission is called upon to administer, implement and enforce Part 732 in the event of a strike or work stoppage, the Commission will inevitably and improperly thrust itself into an area exclusively within the jurisdiction of the NLRB. IBEW indicates that the following comments and questions illustrate this point. IBEW states that since Part 732 waives the LECs performance of service quality standards for the "first 90 calendar days of a strike or other work stoppage," it may be critically important, if not essential, for the Commission to determine exactly when the strike or work stoppage officially began as well as when such strike or work stoppage ended. IBEW indicates that the following questions would need to be answered. For purposes of Part 732, does the strike/work stoppage begin when the first worker walks off the job? When a majority of the workers walk off the job? When the union's executive committee votes to authorize a strike? When the union membership votes to ratify the commencement of a strike? IBEW contends that the Commission's interpretation and enforcement of Part 732 would require that it investigate and adjudicate the "cause" or "causes" of the strike or work stoppage.

IBEW noted that Part 732 does not define "strike" or "other work stoppage." IBEW further notes that neither the Act nor Part 732 contain any provision requiring that the Commission make a determination with respect to the "cause" or "reasons" for the "strike" or "other work stoppage." Therefore, IBEW indicates, for example, that in the event of a strike or other work stoppage that was caused or occurred as a result of the LEC/employer's bad faith or unfair labor practices, Part 732 would still excuse or waive the LEC's performance of the service quality standards during the first 90 calendar days of that strike or other work stoppage. IBEW concludes that the "strike or other work stoppage" exemption would reward the bad acts of that LEC/employer.

IBEW states that the strike/work stoppage exemption in Part 732 fails to even specify that the underlying strike or work stoppage must involve the LEC or its workforce. Therefore, IBEW indicates that a LEC's performance of the Part 732 service quality standard would be waived as long as the Commission determines that the LEC's failure to perform was "caused by" or "occurred as a result of" any strike or work stoppage, including a strike or work stoppage perhaps involving a LEC's vendor, contractor or any other third party.

In summary, IBEW states that in the event of a strike or other work stoppage, the implementation and enforcement of Part 732 will necessarily require the Commission to investigate and determine the "cause" of any strike or work stoppage; whether the failure of the LEC to meet the Part 732 service quality standards "occurred as the result of" a strike or work stoppage; and whether the appropriate party or parties committed "unfair labor practices." IBEW indicates that these determinations are within the exclusive jurisdiction of the NLRB. Therefore, IBEW maintains that the Commission's

implementation, interpretation and enforcement of the strike/work stoppage exemption is preempted by the NLRA.

In response, ITA asserts that IBEW addresses the preemption question as if Part 732 occurred in a vacuum. ITA states that IBEW assumes that the requirement for LECs to pay customer credits under Section 13-712 of the Act is the starting point of the analysis and that the Commission's adoption of Part 732 made a substantive change in the law that adversely affects the economic weapons available to labor. ITA indicates that the numerous arguments and the evidence in Docket 01-0485, as well as the various Commission Orders in Docket 01-0485, show that the appropriate starting point for any analysis is the Illinois General Assembly's enactment of Public Act 92-22, which among other things created new Section 13-712 of the Act regarding basic local exchange service quality and customer credits. ITA asserts that the appropriate legal question is whether the newly enacted requirements for customer credits under Section 13-712 as interpreted by the Commission interfere with the collective bargaining process, such that Section 13-712 is preempted by the NLRA.

ITA asserts that if the legislature had defined the term "emergency situation" in Section 13-712 of the Act and included strikes and work stoppages in the definition, Section 13-712 would not have been preempted by the NLRA since it would not have interfered with the collective bargaining process. ITA states that the economic weapons of both labor and management would not have been effected by such a statute.

ITA also asserts that if the legislature had provided in Section 13-712 that the term "emergency situation" did not include strikes and work stoppages, Section 13-712 would have been preempted by the NLRA since it would have created a mechanism that attempts to force continuity of telecommunications services in Illinois at the expense of management's economic weapons. ITA states that the U.S Supreme Court found that state statutes seeking to provide for the continuity of essential public utility services during strikes were preempted. Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951), and Amalgamated Association of Street , Electric Railway & Motor Coach Employees of America v. Missouri, 374 U.S. 74 (1963).

ITA also contends that the 90 day exemption for strikes and work stoppages adopted in Docket 01-0485 does not weaken the economic weapon available to telecommunications employees prior to the passage of Section 13-712, but rather strengthens that weapon after a reasonable time.

ITA further asserts that the language in the Commission's conclusion in its Interim Order on Rehearing about which IBEW complains simply indicates that the Commission fully considered the various arguments by the parties on both sides of the issue.

Finally, ITA notes that IBEW raised questions pertaining to the implementation of the 90-day exemption for strikes and work stoppages. ITA contends that the questions

reflect a strained reading of Part 732 and should be addressed, if at all, in the evidentiary phase of this proceeding.

Verizon contends that IBEW's position interferes with the collective bargaining process and is contrary to federal law. Verizon asserts that any limitation on the number of days a strike or work stoppage may last in order to qualify as an emergency situation is a violation of federal labor laws. Verizon maintains that IBEW fails to recognize the most important point of Machinists, Garmon and their progeny in relation to this case: any attempt by the Commission to infringe upon the right of management and unions to bargain collectively under Section 7 of the NLRA is preempted.

Verizon states that to suggest, as IBEW has, that fining telecommunications carriers for not performing quality service standards during a strike is not an "interference" with the collective bargaining process is both unfounded and absurd. Verizon states that the opposite is true: an exemption is the only way Part 732 will survive judicial scrutiny. Verizon indicates that the inclusion of a strike in the definition of "emergency situation" simply places the bargaining parties—the unions and the carriers—back in the position each would be in absent the state regulation imposed by Part 732. In contrast, Verizon asserts that without a strike exemption, Part 732 would tilt the balance of economic weapons in favor of one party. Verizon concludes that to save Part 732, the Commission must exclude the collective bargaining process from its ambit.

Verizon asserts that IBEW mistakenly argues that the Commission intended in its conclusion in Docket 01-0485 to ameliorate telecommunications carriers from the burden of strikes. Verizon states that the exclusion of customer service credits for breaks in service caused by strikes does no such thing. Verizon indicates that a union's right to strike or use its other economic weapons is not taken away or otherwise impinged.

In response to IBEW's position that a strike exemption could reward the bad acts of the LEC, Verizon states that it is not the Commission's role to police labor practices. Wisconsin Dept. of Indus., Labor and Human Relations v. Gould, 475 U.S. 282, 286 (1986). Verizon states that the NLRB has exclusive jurisdiction to determine and remedy unfair labor practices by employers and unions. Verizon indicates that the rights of union employees are well protected by the NLRA, and that unions already have sufficient and clearly-defined remedies for bad faith bargaining and other unfair practices. Verizon notes that interference with, restraint of, or coercion in the exercise of employees' rights is an unfair labor practice under Section 8(a)(1) of the NLRA..

Staff notes that both IBEW and AG raise a number of scenarios in which the Commission may be called upon to make determinations that are exclusively reserved for the NLRB, such as when a strike started and ended, and what caused a strike. Staff agrees that an exemption, even of a limited duration, has the potential to involve the Commission in making such factual determinations that are normally addressed by the NLRB. Staff, however, does not believe that the Commission needs to get bogged

down into the minutia of making any such factual determinations that would, in fact, encroach upon the NLRB's jurisdiction. Staff believes that the it may be advisable for the Commission to limit its involvement in such matters by structuring the rule to avoid complex factual determinations better left to the NLRB.

Staff believes that the Commission could implement a few guidelines that would greatly diminish any need for the Commission to step into the shoes of the NLRB. For instance, in determining when a strike started, Staff states that the Commission could start the clock for a seven day exemption at the time the carrier notified the Commission it had been subjected to a strike. Staff indicates that the exemption would automatically end after seven days so there would likely not be a need to determine when the strike ended. Staff also notes that labor unrest in the telecommunications industry is widely covered by the local media, which would report when a strike began and when it would have ended. In summary, Staff asserts that the Commission could structure its rule so that a recognized trigger could mark the beginning of the strike without the need for the Commission to make a factual determination in the manner of the NLRB.

In addition, Staff finds no reason why a determination of bad faith or the cause of a work stoppage would ever be needed. Staff indicates that if Part 732 were to contain a limited exemption of roughly 7 days, it would not matter who caused a work stoppage or why since the mere fact of a work stoppage would trigger the exemption. Regarding a lawful labor action like a secondary picket, Staff indicates that if the picketing caused a work stoppage, the Commission would treat it the same as a strike. Staff concludes that while the concerns raised by both AG and IBEW would require a sophisticated analysis at the NLRB, the Commission would not need to make such an analysis with regard to a limited exemption from the requirements of Part 732. Staff believes that the AG and IBEW exaggerate the threat of preemption under these circumstances.

In conclusion, while Staff continues to take the position that a limited exemption of seven (7) days would not be preempted, Staff indicates that the determinations raised by IBEW and AG that the Commission may be called upon to make are relevant policy factors to be considered in the ultimate decision in this docket. Staff notes that these factors would favor a rule with no exemption for strikes or work stoppages.

F. AG's Position

AG states that precedent exists for not finding state laws preempted where they do not impact the collective bargaining scheme and where preemption threatens state regulation. Massachusetts Nurses Association v. Dukakis, 726 F.2d 41 (1st Cir. 1984) (State regulations were upheld where they do not impact rights, practices and procedures that constitute collective bargaining system); Colfax v. Illinois State Toll Highway Authority, 79 F.3d 631, 633 (7th Cir. 1996), citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 (1985); (Preemption is not found unless an action conflicts with federal law or would frustrate the federal scheme, or unless it is clear from the totality of the circumstances that Congress intended to occupy the field); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 (1985), citing Motor

Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971) (Supreme Court recognized that it cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions). AG indicates that Part 732 customer service credits are not preempted since they do not impact the rights of parties to collective bargaining processes.

AG indicates that Part 732 customer credits are not preempted by Garmon because they are "peripheral" to the NLRA and are, "deeply rooted in local concerns." AG states that Part 732 deals with local telecommunication quality of service and associated customer credits. AG states that Illinois has a long history of regulating local telephone service, and that the impact of poor service quality is a matter of local state interest. AG indicates that Part 732 customer credits arise from this local concern and are not linked to or triggered by strikes or labor actions, or linked to the employer-employee relationship.

AG indicates that the 8th Circuit resolved a similar preemption question, finding that a rate reduction ordered by the Arkansas Public Services Commission was not preempted. Southwestern Bell Tel. Co. v. Arkansas Public Service Commission, 824 F. 2d 672 (8th Cir. 1987). AG states that the carrier in Southwestern Bell argued that the rate reduction ordered by the Public Service Commission was preempted by the NLRA because it affected the company's ability to pay the wages agreed to in a collective bargaining agreement. AG states that the court held that the rate reduction order had, "no relation to the substantive portions of the labor contract...and thus has no relation to the substantive enforcement of the NLRA." AG indicates that the court acknowledged that the rate reduction may have had an indirect effect on labor, but pointed out that this effect is "part of the myriad of government decisions in a regulated industry that will have an effect on labor relations." Southwestern Bell, 824 F.2d at 675. AG notes that the court added that the rate reduction, "while perhaps indirectly affecting future bargaining strategy, does not control the terms of any particular collective bargaining agreement and does not interfere in any impermissible way with the exercise of collective bargaining rights protected by the NLRA." Id. at 674. AG asserts that the Part 732 customer credits, like the rate reduction in Southwestern Bell, are a part of the "myriad of government decisions" that may have an indirect effect on labor relations, but do not deal substantially with labor issues and therefore are not preempted by the NLRA. Id.

AG indicates that the Part 732 customer credits are also not preempted under the Machinists doctrine because they do not interfere with the use of economic weapons that "Congress intended to be unrestricted by any governmental power to regulate." Machinists at 141. AG states that unlike the law in question in Cannon v. Edgar, 33 F.3d 880 (7th Cir. 1994), which required grave diggers and cemeteries to agree on a pool of workers who would perform internments during labor disputes or face sanctions, the Part 732 customer credit provisions do not require parties to a labor dispute to negotiate or to agree with each other about any particular issue. AG indicates that the Cannon court analyzed the Garmon and Machinists preemption doctrines and held that the NLRA preempted the Burial Rights Act because it imposed

specific terms and sanctions on parties involved in labor negotiations. AG states that unlike the sanctions in Cannon, which could only arise from a labor dispute, the Part 732 credits are not linked to a labor negotiation process, but rather apply to carriers whenever a customer service deadline is missed.

AG contends that a rule which grants carriers an exemption in the event of a strike or work stoppage is preempted by federal law. AG states that, unlike the Part 732 customer credit provisions, a strike/work stoppage exemption from the requirements of Part 732 has a direct impact on labor relations since the strike or work stoppage is a necessary condition for the exemption. AG indicates that such an exemption is directly rather than peripherally related to labor relations under Cannon.

In response, Staff asserts that the AG elevates form over substance. Staff acknowledges that a work stoppage would trigger a work stoppage exemption, but asserts that the triggering event is immaterial compared to the effect the exemption would have on the collective bargaining process.

AG asserts that the direct connection between the strike/work stoppage exemption and labor relations is clear. AG states that the exemption arises only when employee-employer relations have reached the point where economic weapons, protected by the NLRA, are used. AG further indicates that the Commission, in order to enforce such a rule, would have to make determinations such as when a strike or work stoppage begins or ends, when employee action is considered a strike or work stoppage for purposes of triggering the exemption, what bargaining units would be covered by this exemption, whether all employee actions would be covered, or only those that somehow affected telecommunications' installation and repair services, and whether a party's good or bad faith conduct affects the exemption. AG asserts that these are the type of issues handled by the NLRB and fall squarely within the federally occupied field of labor relations.

AG indicates that an exemption triggered by a strike or work stoppage will have a direct effect on the ability of parties in a labor dispute to participate in the collective bargaining process and use the economic weapons that Congress has reserved for such disputes. AG asserts that such an exemption will lessen the economic impact on carriers from a strike and ease the burden on carriers if they chose to lock out employees in the course of a labor dispute. AG contends that the exemption is preempted under the Machinists doctrine since it changes the effect of economic weapons used by the parties that are sanctioned by the NLRA.

G. City/CUB's Position

City/CUB state that the NLRA does not mandate preemption of the entire field of labor relations and does not preempt all actions by state governments in dealing with labor issues. San Diego Trade Union v. Garmon, 359 U.S. 236 (1959); Construction Workers v. Laburnum Construction Corp., 347 U.S. at 664 (1954). City/CUB indicate that the United States Supreme Court "has been unwilling to declare pre-empted all

local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions." Farmer v. United Brotherhood of Carpenters, 430 U.S. 290 (1977) citing Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971); Colfax Corp. v. Illinois State Toll Highway, 79 F. 3d 631 (7th Cir. 1996). Given the limitations on Federal authority under the NLRA, courts have been reluctant to infer preemption.

City/CUB contend that under Garmon,the Commission is not preempted by the NLRA from having a rule that does not include an exemption in the event of a strike and/or work stoppage. City/CUB assert that Part 732 concerns the service obligations of carriers to their customers, which are merely of peripheral concern to labor issues. City/CUB further indicate that, given (a) the depth of public and legislative concern that prompted legislative action regarding the quality of local telephone service in Illinois and (b) the longstanding state responsibility for the comprehensive regulation of local telephone service, the issues addressed by Part 732 are clearly matters deeply rooted in local feeling and responsibility.

As further support for their position, City/CUB note that in Massachusetts Nurses v. Dukakis, the First Circuit court examined whether state-mandated limits on hospital charges interfered with the collective bargaining efforts of state nurses. City/CUB state that the court found that hospital costs were a matter deeply rooted in local interest, and therefore not preempted. City/CUB indicate that the court expressly considered this preemption argument in the context of a regulated industry. City/CUB state that in holding that regulatory action was not preempted, the court observed that such preemption would have far-reaching implications:

> In any industry the price of whose product or service–such as electric power, telephone, natural gas, or even rent controlled real estate – is regulated, a state would find its regulatory system vulnerable to preemptive attack on the ground that the overall control of the price was too inhibiting an influence on collective bargaining. Logic, however, would carry beyond simple price control. Any state or municipal program that substantially increased the costs of operation of a business in a competitive market would be similarly vulnerable to the preemption argument.
>
> Massachusetts Nurses, 726 F. 2d at 45.

City/CUB also cite Southwestern Bell v. Arkansas Public Service Commission, which was cited by AG.

City/CUB assert that case law establishes that the Commission is well within its authority to determine whether strikes and/or work stoppages should be considered emergency situations for the purposes of a customer service issue unrelated to labor negotiations. City/CUB conclude that the Commission can lawfully find, without

violating the NLRA, that strikes and/or work stoppages are not emergency situations entitled to a customer credits exemption.

H. Commission's Conclusion

In their arguments regarding federal preemption, the parties have articulated their positions with respect to the following issues: (1) is the requirement that LECs pay credits to customers for failure to comply with the basic local exchange service quality standards specified in Section 13-712 of the Act and 83 Ill. Adm. Code 732.20 during a strike or work stoppage preempted by federal labor law? (2) is the waiver of such a requirement preempted by federal labor law?

The NLRA was enacted to protect the collective bargaining process. The Garmon preemption forbids state and local activities that interfere with the rights granted employees under Section 7 of the NLRA or which constitute unfair labor practices under Section 8 of the NLRA. The Garmon preemption prevents conflicts between the state and local regulation and the federal regulatory scheme embodied in the NLRA. Turning to the first issue above, ITA and Verizon contend that LECs will not be able to meet the service quality standards set forth in Section 13-712 of the Act and Part 732 because they will have lost their work force. If LECs are required to pay credits to customers during a strike or work stoppage, the balance between management and labor in their negotiations could be altered, to the benefit of labor. LECs may feel pressured to succumb to union demands and settle the strike to avoid paying credits. Thus, one could argue that federal labor law preempts the requirement to pay credits to customers during a strike or work stoppage for failure to meet the service quality standards.

The above argument in favor of federal labor law preemption, however, fails to consider the exceptions to the Garmon preemption. Those exceptions provide that state or local regulation is not preempted if (1) the activity is merely of a peripheral concern to the federal labor laws; or (2) if the conduct touches interests so deeply rooted in local feeling that preemption cannot be inferred absent compelling congressional direction. The payment of credits to customers is merely of a peripheral concern to labor issues addressed by the federal labor laws. The payment of credits is only one of many factors to be considered by a LEC in determining whether to settle a strike. For example, any credits issued under Part 732 may be offset by savings to a LEC from not paying wages to employees during a strike or work stoppage. While the payment of credits could have some effect on the overall decision of a LEC to continue resisting a strike, any such payments alone would not cause a LEC to settle a strike. Furthermore, the payment of credits and the associated Part 732 service quality standards are clearly matters deeply rooted in local feeling and responsibility. This fact is demonstrated by the recent public clamor about service quality and the legislative reaction regarding basic local exchange service quality in Illinois, as well as the long-standing recognition of state responsibility for ensuring reliable local telephone service. Accordingly, the Commission concludes that the requirement that LECs pay credits to customers for failure to comply with the basic local exchange service quality standards

specified in 83 Ill. Adm. Code 732.20 during a strike or work stoppage is not preempted by federal labor laws.

The Commission likewise concludes that a waiver of credits to customers for failure to meet the basic service quality standards during a strike or work stoppage is not preempted by federal labor law. Just as a requirement to pay credits is only one of many factors to be considered in determining whether to settle a strike, so also would be the waiver of such credits. A waiver alone would neither cause a bargaining unit to settle a strike nor cause a LEC to extend a strike. The Commission observes that prior to the enactment of Section 13-712 of the Act, any resolution of a labor dispute was achieved in the absence of a requirement for customer credits. The Commission finds that the Part 732 service quality standards, the associated requirement for customer credits, and any waiver of such credits are only peripheral concerns to the federal labor laws and are matters deeply rooted in local feeling and responsibility.

Because of these findings, it is necessary for the Commission to determine in the next phase of this proceeding, the appropriate time period, if any, for a waiver of the requirement for customer credits, in the event of a strike or work stoppage.

IV. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) the Commission has jurisdiction over the subject matter herein;

(2) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;

(3) neither the payment of customer credits for violation of the basic local exchange service quality standards set forth in Section 13-712 of the Public Utilities and 83 Ill. Adm. Code 732.20 during a strike or work stoppage nor the waiver of such credits during a strike or work stoppage are preempted by federal labor laws for the reasons stated above;

(4) it is necessary to determine in the next phase of this proceeding the appropriate time period, if any, for a waiver of the requirement of customer credits for failure to comply with the basic local exchange service quality standards set forth in Section 13-712 of the Public Utilities Act and 83 Ill. Adm. Code 732.20.

IT IS THEREFORE ORDERED that the next phase of this proceeding shall address the issue identified in Finding (4) of this Order.

IT IS FURTHER ORDERED that this Order is not final and is not subject to the Administrative Review Law.

Administrative Law Judge

DATED: December 20, 2002

Receipt deadlines:

Briefs on Exceptions: 01-10-03
Replies: 01-17-03